PLANNING & ZONING CONFERENCE

October 25, 2003

Sponsored by the New Hampshire Office of State Planning

BASICS FOR ZONING BOARDS OF ADJUSTMENT — ORGANIZATION & PROCEDURES —

Presented by

Timothy Bates, Esquire

of

MITCHELL & BATES, PROFESSIONAL ASSOCIATION
25 Beacon Street East
Laconia, New Hampshire 03246

(603) 524-3885 ¢ (800) 785-7409 ¢ Facsimile 524-0745

e-mail: *tblaw@metrocast.net*

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The Zoning Board of Adjustment in New Hampshire is available online at:

http://webster.state.nh.us/osp/ZBAHandbook/Start.html

PART ONE

ORGANIZATION OF THE ZONING BOARD OF ADJUSTMENT

I. Establishment

RSA 673:1 tells us that every zoning ordinance adopted by the local legislative body (town meeting, or city or town council) *shall* include provisions for the establishment of a zoning board of adjustment. The failure of a town to do this when adopting a zoning ordinance renders the ordinance invalid. *Town of Jaffrey v. Heffernan,* 104 N.H. 249 (1962). The zoning board of adjustment is thus an essential "safety valve" in the whole process of regulating the use of land for the public good.

Furthermore, the same statute provides that every building code adopted by the local legislative body *shall* include provisions for the establishment of a building code board of appeals. If the code does not establish a separate board of appeals, which it certainly may do, the building code *shall* designate the zoning board of adjustment to act as the building code board of appeals. In a town with no zoning, and therefore no zoning board of adjustment, the board of selectmen *shall* serve as the building code board of appeals where a separate board of appeals is not created by the building code.

II. Membership

A. Regular Members

According to RSA 673:3, the zoning board of adjustment must consist of 5 members. They shall either be elected, or appointed in a manner chosen by the legislative body. Each member of the zoning board of adjustment must be a resident of the municipality, whether the board is elected or appointed. Typically, the method of appointment is set out in the zoning ordinance, and gives that happy job to the governing body (selectmen, city or town council). The adoption of exotic appointment methods, such as appointment by the cemetery trustees or by throwing darts at pages chosen at random from the checklist of registered voters, is not recommended.

Under RSA 673:5, II the terms of elected or appointed zoning board of adjustment members shall be 3 years, and the initial terms of members first appointed or elected shall be staggered so not more than 2 appointments or elections occur annually in the case of the zoning board of adjustment, except when required to fill vacancies.

If the local legislative body decides to go to an elected zoning board of

adjustment (which would usually require an amendment to the zoning ordinance since normally that ordinance sets out the method of appointment), the appointed members holding office on the day the decision to elect goes into effect continue to serve out their full terms. When the full term of an appointed member expires, a replacement shall be elected at the next regular municipal election in the manner set out in RSA 669. RSA 673:3, I, II. There is thus a potential gap; in a town with a March town meeting, an appointed member whose term expires April 1 would either serve in a holdover position until the following town election, or, a reasonable person could argue that on April 1 a vacancy is created that should be filled by appointment until the following town election. Interesting.

If the local legislative body decides to rescind its action and go back to an appointed zoning board of adjustment, RSA 673:3, III tells us that the elected board shall continue in existence, and the elected members "may continue to serve" until their successors are appointed and qualified. Thus, because the legislature's use of the word "may" in this context is subject to differing interpretations, it is not entirely clear whether an elected member has a right to serve out the entire term, or whether the legislative body may provide that elected members shall be immediately replaced by appointment.

B. Alternate Members

Under RSA 673:6 the local legislative body may provide (again, this should be done in the zoning ordinance) for the appointment of not more than 5 alternate members to a zoning board of adjustment that is also appointed. If the zoning board of adjustment is elected, the board itself may appoint 5 alternate members. In either case, the alternate members serve terms of 3 years each, just like the regular members. Whenever a regular member is absent or disqualifies him/herself, the chairman shall designate an alternate, if one is present, to act in the absent member's place. RSA 673:11.

C. Vacancies

Vacancies (other than those that occur through the natural expiration of a term of office) in the membership of an elected zoning board of adjustment are filled by appointment of the remaining board members until the next regular municipal election at which time a successor shall be elected to fill the remainder of the unexpired term, or for a full new term as the case may be. For an appointed or alternate member, the original appointing authority shall fill the vacancy for the unexpired term. RSA 673:12.

D. Removal of Members

RSA 673:13 provides that after public hearing, regular and alternate members

of an appointed zoning board of adjustment may be removed by the appointing authority (usually the selectmen) upon written findings of inefficiency, neglect of duty, or malfeasance in office. If the zoning board of adjustment is elected, the selectmen may remove regular and alternate members for the same reasons.

"Inefficiency" is a word that seems broad enough to cover even such minor infractions as forgetting to bring the pencils one night. However, removal of a board member is serious business, and ought to be undertaken only for serious reasons. We therefore strongly urge that removal proceedings based on “inefficiency” be undertaken only after thorough review and consultation with town counsel.

"Neglect of duty" has a little more bite to it, and could mean missing a lot of meetings without, or even with, a good excuse. In such a case, we recommend exploring every other avenue to resolve the problem, such as encouraging resignation if the person simply cannot or will not carry the load, short of utilizing the removal procedure.

"Malfeasance in office" has a wonderful, treasonous ring to it reminiscent of Watergate and Teapot Dome. Keep firmly in mind the words "in office." The malfeasance must relate to the performance of the zba member's duties *as a zba member*, *Williams v. City of Dover,* 130 N.H. 527 (1988). Just going around malfeasing in a general way at the same time the person happens to be a member of the zoning board of adjustment is not enough to trigger removal under this statute.

To sum up, removal is a draconian measure that will surely be stressful, and may well prove embarrassing to everyone involved. It should be thought of as a last resort, and avoided if at all possible. It is also not to be overlooked that if a member who is removed is later reinstated by the court upon a finding that the removal was not justified, you can be reasonably sure that the town will then have to pay that member’s attorney’s fees, which depending on the case may well amount to a very significant sum of money.

E. Planning Board Members

In towns and cities, only one member of the planning board may sit on the zoning board of adjustment. RSA 673:7. To be safe, this should include serving as an alternate member of the zoning board of adjustment, because clearly if you have a regular member of the zoning board of adjustment who is a member of the planning board, and an alternate member of the zba who is a member of the planning board, they both might end up acting on the same matter which would certainly mean that two planning board members were then "serving" on the zoning board of adjustment.

In unincorporated towns or unorganized places, the county commissioners shall

determine which members of the planning board for those towns and places, if any, may serve on the zoning board of adjustment.

F. Inherent Membership Conflicts

Although not specifically mentioned in the statute, there are some officials who probably should not be members of the zoning board of adjustment, because of the certainty of regular conflicts which will require that person to step down.

In this category are the person who issues building permits (often the board of selectmen), since the zoning board of adjustment will often have to decide an appeal from the denial of such a permit, or from its issuance if an angry abutter appeals in a timely fashion. Also, if there is a zoning enforcement officer separate from the building inspector, that person's enforcement decisions will certainly be appealed to the zoning board of adjustment from time to time. If these administrative officials also serve as members of the zoning board of adjustment, it gives the appearance of a chummy, improper relationship conducive to undue influence even if that administrative officer takes the legally necessary step of disqualifying him/herself from sitting on the zoning board of adjustment for that particular appeal.

III. Chair/Officers

Every zoning board of adjustment must elect a chair from the appointed or elected members, and may create other officers as it deems necessary. RSA 673:8. Vice-chair and secretary are probably the most usual of these additional officers. The chair and any optional officers shall serve terms of one year, but are eligible for reelection without limit. RSA 673:9.

With a couple of little used exceptions, it is clear that the chair's role is simply to preside at meetings of the board and keep things on track. The chair has no more nor less inherent authority than any other member of the board, and certainly cannot make any decisions on his or her own that are the responsibility of the board as a whole. On the other hand, the chair is not just a procedural figurehead (like the President of the United States Senate who only gets to vote to break a tie), but constitutes 20% of the membership of the board and should participate in every decision and vote.

Under RSA 673:15, the chair, or acting chair in the chair's absence, may administer oaths to those appearing before the board. This should not be necessary. Administering oaths is different than hurling them at those who appear before the board, which may *seem* necessary from time to time, but should not be done audibly.

IV. Training

Within 6 months of assuming office for the first time, any member of the zoning board of adjustment may participate in at least 6 hours of training designed and furnished by the Office of State Planning. RSA 673:3-a. Please do!! This normally takes place at the annual Spring Planning & Zoning Conference, which has been put on in Concord by the Office of State Planning for the past several years, and which has been very well received.

V. Meetings/Quorum

Since the zoning board of adjustment exists solely as an appellate body, it is not required, as is the planning board, to hold regular meetings. Rather, meetings shall be held at the call of the chairman, and at such other times as the board itself may determine. RSA 673:10.

As is true with most public bodies, a majority of the membership shall constitute the quorum necessary in order to transact business at any meeting; that is, 3 members in the case of the zoning board of adjustment.

VI. Staff/Finances

A. Generally

Within the amounts appropriated to it by the local legislative body, RSA 673:16 provides that the zoning board of adjustment may appoint such employees as it deems necessary for its work, who shall be subject to the same employment rules as similar civil employees of the town or city.

The zoning board of adjustment may also contract with engineers, architects, and other consultants (including, presumably, legal counsel) for such services as it may require.

B. Gifts/Grants

The statute also allows the zoning board of adjustment to accept and spend gifts, grants or contributions "in accordance with procedures established for the expenditure of funds within the municipality." It is not crystal clear what is meant by this; perhaps one example would be compliance with any purchasing procedures that have been adopted.

C. Expenditure of Fees

RSA 673:16, II provides a useful and potentially important financial tool for local

land use boards. It allows such boards to collect fees from an applicant to cover an expense lawfully imposed upon the applicant, such as the expense of notice, the expense of consultant services or investigative studies under RSA 676:4, I(g), or the implementation of conditions lawfully imposed as part of a conditional approval, and then to pay out those funds toward that particular purpose *without* having the funds first raised and appropriated by the town meeting. In other words, all of this activity can occur "off budget" and without impacting any amounts appropriated for the operations of the zoning board of adjustment by the annual town meeting.

The statute goes on to provide that such fees:

(a) shall be placed in the custody of the municipal treasurer;

(b) shall be paid out by the treasurer only for the purpose for which the expense was imposed upon the applicant;

(c) shall be held in a separate, nonlapsing account and not commingled with other municipal funds (but such fees may be used to reimburse any account from which an amount has been paid in anticipation of the receipt of such fees);

(d) shall be paid out by the municipal treasurer only upon the order of the zoning board of adjustment or its designated agent for such purpose.

Such fees *do not* include the regular application fees, permit fees or inspection fees that are set by the local legislative body as part of an ordinance, or by the selectmen under the authority of RSA 41:9-a.

There is, however, one problem with this great, flexible scheme. You saw above the reference to the expense of consultant services or investigative studies under RSA 676:4, I(g). Well, that statute only allows *planning boards* to collect such fees from applicants. So we have a potential squabble about whether a zoning board of adjustment can impose fees for those purposes, although it certainly seems that it was the overall intent of the legislature to allow a zoning board of adjustment as well as a planning board to do so. Ideally, the legislature should amend RSA 673:16, II to clarify the point. Until that happens, the next best thing is to insert language in the zoning ordinance that clearly authorizes the zoning board of adjustment to do this, which should look something like the following:

> "The zoning board of adjustment is hereby authorized to impose reasonable fees upon an applicant for the expense of consultant services or investigative studies, review of documents and other matters that may be required by a particular application. Any such fees shall be subject to the provisions of RSA 673:16."

If it is not possible to insert such language in the zoning ordinance, our final advice would be to adopt the same statement as part of the board's rules of procedure under RSA 676:1 (more about those later), except that the first part of that language would read: "The zoning board of adjustment may impose reasonable fees . . . " (etc.). If that is done, at least it puts applicants on notice that they may be asked to pay such fees, but it does *not* remove all doubt about the zoning board of adjustment's authority to impose the fees in the first place.

PART TWO

PROCEDURES OF THE ZONING BOARD OF ADJUSTMENT

I. Introduction

As citizens in a constitutional democracy, we have a fundamental right to notice and an opportunity to be heard when the government is contemplating action that may impair our life, liberty or property. This access to the process of governmental decision making is expressed as our constitutional right to *due process*. What *kind* of process is due will of course vary with the type of governmental action contemplated. Certainly, more process is due a person who may be hanged for murder by the government than one who owns some brush that must be cut from within the limits of a town road.

The governmental actions of local land use boards, including the zoning board of adjustment, can have a major negative or positive impact on the property rights of the landowner seeking development approval, and on the property rights of the neighboring landowners. For this reason, the process, *procedure* if you will, used by the zba must comply with statutory and constitutional commands to insure that the decision-making will be fair, and give ample opportunity for those affected to participate in the process.

That is why when controversial decisions of the zba end up in litigation, the lawyers for whomever is unhappy are surely going to focus on the procedures used by the board, as well as the merits of the ultimate decision that was made. Every board should strive to eliminate procedural errors and lapses that open the door to charges of unfairness, or that result in a record so scanty that the reviewing court is going to throw up its hands in exasperation because it can't tell why the board reached a particular result. Let's see if we can peel away some of the mystery about procedures, and outline a basic approach that should serve you well.

It is useful to think that every matter that comes before the zoning board of adjustment must go through six discrete steps:

1. application
2. notification of the public hearing
3. public hearing
4. findings of fact
5. statement of the board's decision and the reasons for it
6. notice of decision

If you mechanically and religiously stick to this six part routine time after time, no matter what kind of application is before you, you will be doing the town, the applicants, and the abutters a good service.

II. Application and Previous Applications

Naturally, the application form you require should call for the particulars of the matter, such as the location and description of the property, what type of approval is being sought, and the names and addresses of abutters to facilitate the public notice. For a sample application form, as well as other forms and notices you will do well to consult *The Board Of Adjustment In New Hampshire,* published and periodically updated by the Office of State Planning. Several helpful forms are reproduced in an appendix and can be easily created on a word processor. The handbook and associated forms is available online at the OSP website and is an excellent resource:

http://webster.state.nh.us/osp/ZBAHandbook/Start.html

The first step in processing an application should be a review of the board's files to determine if a previous application for essentially the same use on the same land has been denied. If so, the board should still schedule the case for a public hearing, but the first inquiry at the hearing will be to determine whether the application should be accepted or rejected. In order to accept the application and proceed to decide the case on its merits, the zba must be able to find either:

(a) that there has been a material change of circumstances affecting the merits of the application; or

(b) the application is, in fact, for a use that materially differs in nature and degree from the earlier application.

This is because if landowners were permitted to submit successive applications for essentially the same use, "there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on [neighboring] property owners seeking to uphold the zoning plan." *Fisher v. City of Dover,* 120 N.H. 187 (1980).

Naturally, the board should listen first to the applicant and then to the abutters about whether there has been a material change of circumstances affecting the merits of the application or why the application is or is not materially different from an earlier one. In deciding whether to proceed with the new application the zba should spell out the reasons *why* it concluded that the application either meets or fails the test.

III. Notice and Public Hearing

The zoning board of adjustment *must* hold a public hearing before deciding any application. RSA 676:7 tell us how to go about this hearing. Here are the requirements:

(a) the appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by certified mail;

(b) the notice must state the time and place of the hearing;

(c) the notice must be given not less than 5 days before the date of the hearing (of course you should always give more than that unless there is some darn good reason why you can't!);

(d) the notice of the hearing shall be published in a newspaper of general circulation in the area not less than 5 days before the date of the hearing;

(e) a notice that the zba will meet to conduct the public hearing should also be posted in at least two public places in the town;

(f) the public hearing must be held within 30 days of the receipt of the appeal (the applicant should be willing to waive this if the board members are temporarily scattered over the planet; if so, get the waiver in writing).

Naturally, the notice must also describe what the application is all about. It should include the name of the applicant, a brief description of the property (tax map and lot number and what road it's on), and what the applicant proposes to do (for example: "The applicant seeks a variance to place a garage closer to the side lot line than allowed by Article IV, Section 2.3 of the East Buttercup Zoning Ordinance.").

Who may speak at the hearing? Well, naturally the applicant should present the matter to the board. RSA 676:7, I(a) tells us that:

> "The board *shall* hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration. The board *may* hear such other persons as it deems appropriate." (emphasis added.)

"Abutter" is defined by RSA 672:3 as, in pertinent part:

> "any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only, and not for purposes of notification, the term "abutter" shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration."

Section III of the statute goes on to say that any party may appear in person, or by his agent or attorney at the hearing. "Parties" include abutters and those directly affected by the proposal as well as the applicant.

Finally, the cost to mail, post and publish shall be paid in advance by the applicant, and failure to pay those costs shall constitute valid grounds for the board to terminate further consideration and to deny the application without public hearing.

IV. Rules of Procedure

Under RSA 676:1, the zoning board of adjustment must adopt rules of procedure concerning the method of conducting its business. Such rules shall be adopted at a regular meeting of the board and shall be placed on file with the town or city clerk for public inspection. Here again, *The Zoning Board Of Adjustment In New Hampshire* published by the Office of State Planning, gives excellent guidance about what those rules of procedure should address, and includes suggested rules in an appendix.

THERE IS ONE CRITICAL RULE THAT MANY ZBA'S HAVE NEVER ADOPTED, AND THAT FAILURE CAN LEAD TO LEGAL WRANGLING!

Under RSA 676:5, I appeals concerning any matter within the board's powers under RSA 674:33 (that is, appeals from an administrative decision and appeals requesting a variance; special exceptions probably should not be included because of the board's "original jurisdiction" to consider applications for special exceptions) *"shall be taken within a reasonable time, as provided by the rules of the board[.]"* (emphasis added.) If the zba has not adopted a rule that sets such a time limit for appeals, there is the real potential that at some point the town will end up in very expensive litigation about whether a particular applicant did or did not file his or her

appeal within a "reasonable" time. HINT: It's not worth it. Adopt a rule. We suggest that any time between 14 days and 30 days is probably sensible.

NOTE: In *Daniel v. B & J Realty,* 134 N.H. 174 (1991) the Supreme Court held that the zba had no power to extend the 14 day appeal deadline it had adopted under RSA 676:5 - the rule stated that appeals "shall" be taken within the 14 day period. The rule could have gone on to say something like:

> ". . . except that the board may vote to extend such appeal period for good cause shown and when the rights of interested parties will not be unduly prejudiced."

If the rule contained language like that, the *Daniel* Court might well have upheld the board's authority to grant such an extension. So if you want some flexibility, use extension language along the lines suggested.

V. Joint Meetings and Public Hearings

RSA 676:2 is a tool that probably is not used often enough. It is a very useful mechanism for the applicant, abutters, zba's and planning boards. The statute provides that an applicant who needs the approval of both boards may request that the two boards hold a joint meeting or public hearing, and each of the boards may also request this on its own. This situation typically arises when a proposed project requires site plan approval from the planning board and a special exception or variance or both from the zba. Just as one example, a joint approach may be particularly useful for applicant and land use boards alike in such a case, since a previously granted special exception will have to be reconsidered by the zba if the "relevant aspects" of the proposed use are changed as it goes through site plan review before the planning board. See, *Sklar Realty, Inc. v. Town of Merrimack,* 125 N.H. 321 (1984).

Each board has the discretion to decide whether to hold a joint meeting or hearing, regardless of whether the applicant or the other board made the request.

The planning board chair acts as chair of the joint meeting or hearing, but each board is of course responsible for rendering a decision on the subject matter that is within its jurisdiction, and each board should prepare minutes and other documentation as it would do if meeting singly.

Finally, procedures for joint meetings or hearings relating to testimony, notice of hearings, and filings of decisions shall be consistent with the "normal" statutory procedures that govern the individual boards.

VI. Developments with Widespread Impact

A. Introduction

There are several statutory provisions that may come into play when a proposed development is so large, or so situated, that it is likely (or certain) to have significant "spillover" effects in adjacent communities. Let's take a look.

B. Developments of Regional Impact

1. Generally

Several sections of the statutes beginning at RSA 36:54 address procedures that must be used to assess and process proposals that have the potential to cause regional impact. Under RSA 36:56, every local land use board "shall" promptly review *every application for development* and determine whether the proposal, if approved, could reasonably be construed as having the potential for regional impact. Any doubt must be resolved in a determination that the proposal *does* have a potential regional impact. (Keep in mind that the definition of "local land use board" under RSA 672:7 includes *an individual building inspector,* as well as the planning board, zoning board of adjustment, historic district commission and building code board of appeals. It is possible, especially in a town without site plan review regulations, that a significant development (the next Wal-Mart or Rite-Aide for example) might need only a building permit if the use is permitted under the zoning ordinance, or if there is no zoning in the first place. In such a case, it is the duty of the building inspector to follow the provisions of the statute to address the potential regional impact of the proposal.)

2. Determination of Regional Impact

In determining whether there is a regional impact, the board or building inspector should take into account the following factors set out in RSA 36:55, although the list is not intended to be exclusive:

(a) relative size and number of dwelling units compared with existing housing stock;

(b) proximity of the development to the borders of a neighboring community;

(c) transportation networks;

(d) anticipated emissions such as light, noise, smoke, odors, or particles;

(e) proximity to aquifers or surface waters that cross municipal boundaries;

(f) impact on shared facilities such as schools and solid waste disposal facilities.

3. Procedure for Review

Under RSA 36:57, if the local land use board determines that the proposed development has a potential regional impact, the board shall afford the regional planning commission and the affected municipalities the status of abutters. They are thus entitled to receive all the notices that "real" abutters to the proposal will receive, and their representatives are entitled to give testimony and other evidence at any public hearings. Specifically, the board must notify, by certified mail, the regional planning commission and affected municipalities, at least 14 days prior to any public hearing on the proposal, of the date, time and place of the hearing, *and of their right to testify concerning the development.*

Also, within 72 hours of reaching a final decision regarding such a development, the board shall send a copy the minutes of the meeting at which the decision was made, by certified mail, to the regional planning commission and each affected municipality.

C. Access to State Highways

Along the same lines as the statutes that address potential regional impact, RSA 674:53, VII has a narrower concern. It provides that whenever a subdivision or site plan application includes land that accesses the State highways over town roads maintained by another New Hampshire municipality, the board of selectmen (or town or city council) and the planning board of that other municipality shall be deemed "abutters" for purpose of receiving any notices that are sent to "real" abutters.

The statute also authorizes the planning board to adopt regulations that identify additional circumstances in which notice to adjoining municipalities is required.

Finally, the statute also provides that the planning board may consider the effect of the proposal on adjoining municipalities in determining whether an application satisfies its regulations. The logical implication of this is that the planning board could legally deny an application where a real hazard to public health or safety would be created in a neighboring municipality. Such a situation could occur, for example, where a significant multi-family development was proposed within and on the boundary of one town, but where access to and from the development is over roads in an adjoining town. If the developer was unwilling to address and mitigate those impacts by funding the needed off-site improvements in the adjoining town, a

sound basis for denial of the proposal would exist under the statute.

D. Governmental Land Uses

Another type of development that often creates unusual impact is that undertaken by government itself. This happens because government installations such as fire stations, schools and the like can be and often are established in the middle of single family residential neighborhoods without regard to the limitations imposed by local zoning. See, e.g., *McGrath v. City of Manchester,* 113 N.H. 355 (1973); *Cheshire v. Keene,* 114 N.H. 56 (1974); *City of Portsmouth v. Clark,* 117 N.H. 797 (1977).

In an attempt to afford some additional public scrutiny of the wisdom of governmental development proposals, the legislature enacted RSA 674:54 in 1996. The statute applies to any use, construction, or development of land owned or occupied, or proposed to be owned or occupied, by the State, university system, or by a county, town, city, school district, or village district, or any of their agents, for any governmental purpose.

It requires that the unit of government that proposes to use the land shall give written notice to the municipality in which the land lies, if the proposal constitutes a "substantial change in use or a substantial new use." The written notice shall contain plans, specifications, and explanations of proposed changes.

The municipality or its designated land use board may hold a public hearing regarding the proposed governmental use, and this must be held, if at all, within 30 days of the receipt of the notice from the other unit of government. If a public hearing is held, the unit of government providing the notice must send a representative to present the plans, specifications or explanations.

The municipality shall provide *nonbinding* written comments regarding conformity with normally applicable land use regulations to the governmental unit proposing the use within 30 days of the public hearing.

Finally, the statute exempts from this notice and hearing process the layout or construction of public highways of any class, and the use of land for distribution lines or transmission apparatus of governmental utilities.

VII. Standing

The concept of "standing" attempts to define which individuals have the right to bring an appeal in the first instance. RSA 676:5, I says that appeals to the zba "may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer."

Certainly, applicants always have the right to appeal a denial of a permit, and abutters are always going to have standing to appeal the granting of one. Persons who are not abutters, but who own property close enough to the land in question so that they can demonstrate that they are "affected directly" by the proposal will also qualify as a person aggrieved.

VIII. Making the Decision

A. Three Votes Required

RSA 674:33 tells us that the concurring vote of 3 members of the zba "shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant on any matter on which it is required to pass."

Now, if a full 5 member board is present for the public hearing and decision making, the applicant only needs the vote of 60% of the members. But if only 4 participate, the applicant needs 75%, and 100% if a bare quorum of 3 members are to decide the matter. It is therefore the common wisdom that an applicant should be given a choice to put the hearing off to another day if a full 5 member board cannot be present to hear and decide the matter. If the applicant decides to proceed with less than 5 members, he or she should be told, and a record of this should form part of the minutes, that the fact that less than 5 members decided the case will not be considered as a proper ground for rehearing if the application is denied.

Finally, the Supreme Court has decided a couple of cases unrelated to land use law that may have implications for zba and planning board decision making. In essence, the court has said that if judging the credibility of a fact witness is crucial to the board's decision, it may violate the parties' due process rights to have a board member participate in the decision *who was not present to hear and observe the testimony of the fact witness who testified at the public hearing.* See, e.g., *Petition of Grimm,* 138 N.H. 42 (1993); *Petition of Smith,* 139 N.H. 299 (1994). Be aware of this in the event a full member or alternate is asked to participate in the actual decision who was not present to hear and observe the live witnesses *if* an evaluation of the live testimony of witnesses is a key issue in resolving how to decide the case.

B. Findings of Fact

It is impossible for a reviewing court, or for anyone else, to determine whether the zba's decision is reasonable and lawful unless the board makes a record of the bases for that decision. As stated in Anderson, *American Law of Zoning,* section 20.41 (1977):

> "In general a board of adjustment must, in each case, make findings which disclose the basis for its decision. Absent findings which reveal at least this much of the process of decision, the reviewing court may remand the case to the board for further proceedings. Thus a bare denial of relief without a statement of the grounds for such denial will be remitted to the board for further action. A decision granting a variance will be remanded, if the board fails to make findings which disclose a basis for its determination."

After the public hearing is closed, the board should deliberate on the essential facts that the testimony has established. For example, if a variance has been requested, and conflicting evidence has been received about whether the proposed use will diminish property values in the neighborhood, the board should vote to find as a fact that values either will, or will not, be diminished, and why (increased density, noise, congestion, traffic, or what have you). The record of the zba's decision about property values might read along the following lines:

> "Diminution of surrounding property values: The board finds that granting the variance will not will not diminish the surrounding property values. Although several abutters testified about their beliefs to the contrary, the report of the ACME Appraisal Company submitted by the applicant concludes that the construction of the requested deck five feet into the setback will not diminish the surrounding property values, especially since many other houses in the area already have similar decks. We find the ACME report to be persuasive."

C. Statement of Reasons/Decision

A statement of reasons should be included as part of the decision, and both must of course rest on the facts as found by the board. For example, a motion "to deny the variance because the board has found that the proposal would diminish surrounding property values" contains both the facts found by the board and the legal conclusion that they compel.

D. Notice of Decision

Under RSA 676:3 the zba must issue a final written decision that either approves or disapproves an application. If the application is denied, the board must include in the notice, which must be sent to the applicant, ***the reasons why the application was denied***.

There are separate forms for the grant or denial of an application included in the appendix to *The Zoning Board Of Adjustment In New Hampshire,* published by the Office of State Planning.

PART THREE

REHEARINGS AND APPEALS

I. Introduction

Some may argue that there is little or no reason for zba members to learn the process that occurs after their decision has been made on the application before them. However, by having at least a general appreciation of the appellate process, board members will be better able to understand their role and to also understand the respect that the legislature has mandated should be accorded to zba decisions. Furthermore, knowledge of the required motion for rehearing (sometimes there will be more than one! before the zba is finished with its part of the case!) is important as it is the required preliminary step to appeal the board's decision to court.

II. Motion for Rehearing

RSA 677:2 allows for a rehearing to be requested by a selectmen, any party to the proceeding, or any person directly affected by the board's decision. There are two preliminary determinations that must be made when such a request is received.

First, there's a ***strict*** 30 day time limit for filing the motion for rehearing. This limit *cannot be waived by the board* and therefore, if the motion is not filed within that 30 day period, it must be denied on the basis that the board simply has no jurisdiction to hear it. Under RSA 677:2 the 30 day limit is counted in calendar days beginning with the date upon which the zba voted to approve or disapprove the application.

The second preliminary question involves the determination of whether the person filing the motion is a "party" or a "person directly affected" by the decision. While this phrase includes more than just abutters, some proximity to the property is required and an evaluation of the potential impact on the property of the person requesting the rehearing is appropriate. See, *Weeks Restaurant Corp. v. City of Dover,* 119 N.H. 541 (1979). If the person is not directly affected in a way that differs from the impact on members of the public at large, the motion for rehearing should be denied.

In the case of *Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment*, (January 23, 2003) the New Hampshire Supreme Court, in an unusual 3-2 split decision, ruled that under RSA 677:2 and RSA 677:4, the only local municipal board that can move the zba for rehearing and then appeal to superior court is the board of selectmen. Other boards, like the conservation

commission in this case from Hookset, may appeal an administrative decision to the zba in the first instance (See RSA 676:5, I), but may not file a motion for rehearing and then appeal to superior court if the board is not content with the zba's decision.

The decision of whether to grant a motion for rehearing to a person or entity with the necessary standing is left to the judgment and discretion of the board and of course will depend on the content of the argument within the request or motion. However, board members too often make the mistake of making their determination solely on the basis of whether there is "new evidence" contained in the request; that test, by itself, is not a valid basis.

The Legislature provided for rehearings to give the board an opportunity to correct any errors it may have made in its original decision. Therefore, *even if there is no new evidence presented*, the motion should be granted if the rehearing request raises legitimate questions as to the soundness of the initial decision. It is possible, even with no additional evidence presented, that either additional legal arguments or the same basic facts argued in a different and more persuasive manner will convince the board that it may have made an error. If so, grant the rehearing. Granting the rehearing does not necessarily mean that the board is going to end up ruling differently on the application; rather, it means that the board wants to make sure of the soundness of its decision and wants to make sure that both sides have had a full opportunity to present all facts and positions. It is much better to get any errors or misunderstandings out of the way before the zba, rather than setting the stage for a lengthy and expensive court battle.

RSA 677:3, II provides that the ZBA has 30 days to decide whether to grant or deny the motion for rehearing, or suspend its earlier decision for further consideration. *This is not a time limit for holding another hearing on the merits but rather only a time period within which to grant or deny the motion for rehearing*.

Also, it is important to understand that *the board does not hold a public hearing to take testimony and other evidence before deciding whether to grant the motion for rehearing*! Rather, the motion should simply be considered and decided by public deliberations of the members at a properly noticed meeting of the board held within the 30 day allowable limit – the decision should be made based upon the contents of the written motion for rehearing (and any written objection to that motion if one is submitted). (**NOTE:** it is ***NEVER*** proper for the members to be contacted individually by telephone to cast their vote on whether to grant the motion - the decision must be made in public at a public, properly noticed meeting of the zba).

If the motion for rehearing is granted, the *actual rehearing* must then be scheduled, with new notice by certified mail to the applicant and abutters. The

statutes do not state that the rehearing must be held within a certain number of days from the time the motion is granted, but it is good practice to hold the rehearing without undue delay.

ZBA members are often unaware that the statute allows them to suspend a decision and deliberate further in response to a motion for rehearing. This alternative is useful for conducting further deliberations or to buy time to consult with town counsel.

III. Appeals to Superior Court

A. General

Board members will be interested to know that a person appealing to the court is (usually) only allowed to raise issues that have first been brought to the zba's attention in the motion for rehearing. The statute does have discretionary language to allow the Judge to vary that requirement, but only for good cause shown. Trial Court judges are usually very reluctant to allow additional information into a court trial that has not been brought before the zba first; this reluctance arises from the Legislature's expression in the zba statutes that a degree of deference should be given to the local decision. Also, what is the point of having a local decision-making board like a zba or planning board if a party can lay in the bushes and only put forward their strong arguments for or against an application after the matter lands in court?? – such tactics would turn the court into super land use boards, which is not consistent with the Legislature’s intent and finds no sympathy with the judges!

Once the board has either denied the motion for rehearing or issued a new or further decision, under RSA 677:4 an aggrieved party has 30 days to appeal to the court. That deadline, strictly enforced, is again determined by counting from the day the decision on the rehearing (or the denial of the motion for rehearing) is made.

B. Burden of Proof

Under RSA 677:6 the burden is on the party seeking to overturn the zba to show that the board’s decision is unlawful or unreasonable. Often the second part of the test is described in terms of a reasonable person standard; i.e. the court will not interfere with the board's judgment unless it first finds that reasonable persons could not have reached the same decision based on the information that was before the board. If the court finds that reasonable persons could have reached the board's conclusion, the judge is not supposed to overturn the board's decision even if the judge, had he or she been sitting as a member of the board, may have decided differently.

C. Certified Record

With the guidance of the attorney who is representing the zba, the board or its staff will be responsible for preparing and filing with the court a complete copy of its file, including minutes. Care should be taken to assure that the file is complete, well organized and that it does not include any confidential communications with town counsel protected by the attorney/client privilege.

D. Restraining Order

Under RSA 677:9 the act of appealing a zba decision does not stay any enforcement proceedings upon the decision appealed from, nor does the appeal have the effect of suspending the decision. However, the court may grant a restraining order to change that status if the necessary conditions are present to justify such an order in a particular case.

E. Evidence

Under RSA 677:10 the trial of appeals of the zba's decisions are not governed by technical rules of evidence.

PART FOUR

CONFLICTS OF INTEREST AND DISQUALIFICATION OF BOARD MEMBERS

I. Disqualification

Under RSA 673:14, no member of a planning board, zoning board of adjustment, building code board of appeals, heritage commission or historic district commission shall participate in the hearing or decision of any matter if that member has a direct personal or financial interest in the outcome that differs from the interest of other citizens. *Reasons for disqualification do not include knowledge of the facts involved gained in the performance of the member's official duties* (see below). When there is uncertainty about whether a member should step aside, section II of the statute provides that member who thinks he or she may have a conflict, or any other member, may request a vote on the question, which shall be taken before the public hearing. *However, the vote is advisory and non-binding.* If a member does step aside, the chairman shall designate an alternate member to serve on that application.

The Supreme Court has decided that a member of a land use board who is acting in a quasi-judicial, as opposed to a legislative, capacity must be disqualified if he or she is "not indifferent" to the outcome of the application. *Winslow v. Town of Holderness,* 125 N.H. 714 (1984). Members act in a "quasi-judicial" capacity when

they apply the law (including local land use regulations and provisions of State law that may be applicable) to a particular set of facts, and render a decision on a proposed use of land. They act in a legislative capacity, for example, when they debate and decide the content of local land use regulations, or decide what recommendation to make to the voters about that content.

If a member who should step aside from a quasi-judicial decision does not, the decision of the board may well be ruled invalid *even if all the other members vote the same way as the disqualified person,* because the *Winslow* Court ruled that "it was impossible to estimate the influence one member might have on his associates." To protect the integrity of the board's decisions, any member who has some kind of an axe to grind in respect of a particular application should voluntarily step aside, since there is no statutory mechanism to *force* that person to do so. However, it could well be to a litigant's potential advantage if the challenged board member refused to step down in the face of overwhelming opposition from his fellow board members.

There is no single statutory definition of what constitutes a conflict of interest. *Bourne v. Sullivan*, 104 N.H. 348, 351 (1962). As general rule, however, a conflict of interest will be found to exist when a board member has a direct personal and pecuniary interest in the matter before the board that is immediate, definite and capable of demonstration, as opposed to being speculative, uncertain, contingent or remote.

If the member has *some* connection to the matter before the board, but the interest is such that individuals of ordinary capacity and intelligence would not be influenced by it, then there is no impermissible conflict. *Atherton v. Concord*, 109 N.H. 164 (1968).

A distinction must be made between preconceived points of view and prejudgment of a matter. Preconceived points of view about certain principles of law or a predisposed view about certain public policies (e.g. planning board members favoring or opposing growth control as a general matter) is not necessarily disqualifying. But a prejudgment concerning issues of fact in a particular case certainly disqualifies an individual from sitting in a quasi-judicial capacity in the review of such an application. *New Hampshire Milk Dealers Ass'n v. Milk Control Board*, 107 N.H. 35, 339 (1966). *State v. Laaman*, 114 N.H. 794 (1974).

Guidelines for determining a conflict include the following:

(a) does the board member expect to gain or lose from his/her position on the matter?

(b) is the member of a board related to any party?

(c) has the member of the board assisted or advised either party in this particular matter?

(d) has the member of the board directly or indirectly given his/her opinion or formed an opinion?

(e) is the member of the board employed by or does that person employ any party in the case?

(f) is the member of the board prejudiced to any degree regarding the case?; or

(g) does the member of the board employ any of the counsel appearing in the case?

These questions, referred to as "juror standards," provide an excellent guideline for determining whether a conflict of interest exists; however, the Supreme Court has recognized that they must be interpreted with a degree of common sense. The key to applying the juror standard is whether an individual is sufficiently indifferent so that he or she can hear the matter in an impartial manner. Even individuals who have formed opinions are not necessarily disqualified if they can set aside their opinions and decide the case on the evidence before them. This is true even where the person is sitting as a juror in a criminal prosecution. *State v. Aubert*, 118 N.H. 739 (1978); *State v. Laaman*, 114 N.H. 794 (1974).

For a more detailed and excellent discussion of the general problem of conflict of interest, see *"STEPPING ASIDE- Public Official Conflicts Of Interest In New Hampshire"* by H. Bernard Waugh, Jr., Esquire, Chief Legal Counsel to the New Hampshire Municipal Association (*Town & City Magazine,* November/December, 1986).

II. Use of Member's Own Knowledge

A. Generally

It is well settled that members of local land use boards may draw upon their own knowledge of certain factors in making ultimate decisions on proposals that come before them. *Vannah v. Bedford,* 111 N.H. 105 (1971). Not surprisingly, such personal knowledge may support legislative actions of land use boards, as well as when the members act in their "quasi-judicial" capacity to decide particular applications. *Quirk d/b/a Friendly Beaver Campground,* 140 N.H. 124 (1995).

So, for example, board members may rely on their own knowledge of factors such as traffic conditions, surrounding uses, and their opinion of the probable impact of the proposed development on the surrounding neighborhood. *Nestor v. Town of Meredith Zoning Board of Adjustment,* 138 N.H. 632 (1994). Thus, personal knowledge is a valuable tool to help the members sift through the often conflicting testimony of the "dueling experts" who offer absolutely contradictory conclusions about the expected impacts of a development proposal.

B. Limitations

There are, however, limits to the extent that board members may reject evidence in favor of their own personal opinion or "knowledge." In *Condos East Corp. v. Town of Conway,* 132 N.H. 431 (1989) the Conway Planning Board denied a subdivision application for 96 condominium units because the applicant was unable to provide a second road access to the site. The board members were concerned that the Ledgewood Road, the only road giving access to the development, could not safely accommodate the additional traffic. Members were especially concerned about the possibility of having an accident that might block the road during a snowstorm at the same time emergency vehicles needed to get to the development.

To address the board's concerns, the applicant hired an engineer to do a feasibility study to determine the adequacy and safety of the single proposed access. After a thorough review of the matter, the expert recommended certain improvements to the road, including reconstruction of the storm drain system and substantial widening of the road and its shoulders. He concluded that once these improvements were made, Ledgewood Road could safely carry the increased volume of traffic, and that an accident or stuck vehicle would be unlikely to block the entire 32 foot width of the road so that emergency vehicles would be unable to get through to the development. The developer was willing to pay for the necessary improvements recommended by his expert.

Not surprisingly, the planning board was unwilling to approve the subdivision based only on the findings of the applicant's expert. It was therefore agreed that the board would engage a completely neutral, unbiased academician to conduct a similar study for the board at the applicant's expense. The board chose a professor from the University of New Hampshire, and his report concluded that the addition of the 96 condominium units would not pose an unreasonable risk to the current and future users of Ledgewood Road, and the single access to the development would not create a hazard. This opinion was shared by a third individual from the North Country Council.

In spite of the unanimous opinion of the experts, including the planning board's own expert, the board denied the subdivision, primarily on the grounds that the single proposed access from Ledgewood Road was insufficient and a

threat to public safety.

The superior court reversed the board's decision, and the supreme court agreed with that reversal. The supreme court stressed the fact that although board members are free to rely on their own judgment and experience, they are not free to completely ignore uncontradicted expert advice.

Does this case mean that the board must always accept as true expert conclusions that are not contradicted by some other expert? Absolutely not. The *Condos East* case came out the way it did because the courts found there was just not one shred of evidence to support the denial. The result would have been different if it were clear that the applicant's expert had overlooked some important factors, or had reached conclusions that were plainly not justified on the known facts. The lesson is, yes, be cautious in rejecting expert conclusions, especially where the applicant's expert is the only one. But do not hesitate to apply your personal knowledge of local conditions to test the ultimate conclusions offered by experts. And reject those conclusions if they are not supported by the known facts.

PART FIVE

THE "RIGHT TO KNOW LAW"

I. Introduction

New Hampshire's “Right To Know Law,” RSA 91-A, affects all aspects of town government. While following this law sometimes causes difficulties for town boards and agencies, the underlying premise is that each board member, official or employee is working for the public, performing the public's business, and therefore the public has the right to know what is going on. There is no more important task in dealing with the public than to religiously comply with the requirements of the "Right To Know Law."

The preamble to the “Right To Know Law” emphasizes this purpose when it states "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to insure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people."

The following discussion cannot possibly cover all of the provisions of the law and how they might be interpreted and applied in a given factual setting. Although

the following material is a good basic guide, you must always consult the law itself, and seek advice from town counsel in complicated situations, to be confident you are complying with the spirit and letter of the law to the best of your ability.

II. Requirements

The provisions of the law must be carefully followed by all local land use boards. The law addresses two broad areas of concern, access to meetings of public boards, and access to records of public boards and officials.

A. Meetings

Under RSA 91-A:2, and in addition to any notice requirements provided by the land use board statutes, notice of all board meetings must be either posted in two public places 24 hours in advance of the meeting or published in a newspaper 24 hours in advance of the meeting. The calculation of the 24 hours does not include Sundays or legal holidays.

According to the statute, a "meeting" is defined as the coming together of a quorum of the board to discuss or act upon a matter over which the board has supervision, control, jurisdiction, or advisory power. Note that discussion alone is enough to make a meeting; the board doesn't have to make a decision in order to be involved in a public meeting. While it is not a good practice under any circumstances to discuss cases outside regular meetings, if a quorum of board members happen to be present in one location, it is especially important that board business not be discussed at all.

Any person at a public meeting shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras and videotape equipment.

B. E-mail Conversations

It seems clear that the compellingly easy use of e-mail among land use board members may well violate the law if those messages amount to deliberating on the merits of a particular application or exchanging information about an application. A legislative study committee is looking into possible amendments to RSA 91-A to address communications in the internet age. One hopes that the law will be clarified about the use of e-mails. Until it is, you will do well to limit any exchange of e-mails among board members to routine procedural items such as the date and time of the next meeting and the like. We haven't yet seen the appeal to superior court that involves a subpoena to recover e-mails from the hard drives of the planning board members, but I have a funny feeling that it will happen sooner rather than later.

C. Nonpublic Sessions

Nonpublic sessions are only permitted under very limited circumstances set out in RSA 91-A:3, II. For the most part, the matters for which a nonpublic session may be held are unlikely to come before a land use board. However, there are a few circumstances that might allow the use of a nonpublic session, as follows:

(1) RSA 91-A:3, II(b) - the hiring of a person as a public employee; for instance, the board might be asked for its advice on the hiring of an individual to be secretary for the board, and might wish to discuss that person's abilities in nonpublic session.

(2) RSA 91-A:3, II(c) - matters that, if discussed in public would likely affect adversely the reputation of any person, other than the member of the body or agency itself, unless such person requests an open meeting.

(3) RSA 91-A:3, II(e) - discussions and decisions about litigation involving the board, *but only if that litigation has already been filed in court or threatened in writing*.

For a board to legally enter a nonpublic session, a motion must first be made by a member that specifically states the statutory provision that allows the nonpublic session to be held. A role call vote must be taken and recorded in the minutes, showing how each member voted on the motion. While in the nonpublic session, the board must stick to the subject that was the stated in the motion as the reason for entering the nonpublic session. Minutes of nonpublic sessions must be disclosed to the public within 72 hours, unless two-thirds of the members vote to seal the minutes after a determination that "divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or the agency itself or render the proposed action ineffective."

D. Minutes of Meetings

As required by RSA 91-A:2, II and RSA 91-A:3, III, minutes must be kept of each meeting, including any nonpublic session that may be held. At a minimum, the minutes must include:

(1) the names of the board members present and those of the persons appearing before the board. This provision requires only the recording of names of persons actually speaking to the board; it does not require notation of the names of everyone in the audience;

(2) a brief description of the subject matter discussed; and

(3) any decisions made.

The minutes of a regular public meeting must be made available to the public within 144 hours, but within 72 hours for any nonpublic session. If the board has a practice of having the minutes reviewed at the next board meeting before they become “final” or “approved,” then the draft minutes, subject to revision, must be made available by those deadlines.

All records of land use boards are open to public inspection, including tapes made in the course of a meeting. All records should be kept at the board's regular place of business and requests for copies of records should be promptly complied with; if prompt compliance is not possible, the individual should be told the reason for the delay, and in no case should there be a delay of more than five days from the time the request is made. A person requesting records may be charged copying costs but those costs may not exceed actual costs.

E. Board Records

The “Right To Know” Law provides several general categories of records that are exempt from disclosure to the public. However, most of the categories have no bearing on the business and records of land use boards. It would be very unusual for a land use board to receive a record to which a claim of exemption from RSA 91-A applied, but the categories in which this situation is most likely to occur are listed in RSA 91-A:5, IV. They are records pertaining to confidential, commercial or financial information or other files whose disclosure would constitute an invasion of privacy.

The best advice for any town employee or official is to contact the town's attorney before refusing to disclose records in the files of a land use board.

F. Remedies for Violations of the Law

Refusal to provide a public record or give a member of the public notice of or access to a board meeting may, of course, lead to court action being brought against the town. The statute is very specific as to what the judge who hears the case is empowered to do. The judge may:

(1) consider the award of attorney's fees against the town if the judge finds that the "body, agency or person knew or should have known that the conduct engaged in was a violation of” the “Right to Know Law”;

(2) if the court finds that the person involved acted in bad faith, the statute specifically allows the judge to award the plaintiff’s attorney's fees personally against the individual who committed the offense. If a court

makes a finding of bad faith, there is no obligation on the part of the town to reimburse that expense to the individual;

(3) the court may invalidate any decision of the land use board. This may cause mere embarrassment to the board, but it could have a dramatic impact on an applicant who has proceeded with other town approvals and possibly even started construction or made further investment based on the board's decision;

(4) finally, the court is empowered to issue an injunction against any further violations of the law; this would be most likely to happen if the court found that the board generally behaved with little or no regard for the provisions of the "Right To Know Law."

G. Tales out of School; Site Visits.

In the same vein as the above caution about the use of e-mail, be careful about accepting phone calls at home from applicants or other board members, or discussions at the local store, concerning issues pending or about to be presented before the board. Such contacts may well be improper and can lead to invalidation of the board's eventual decision.

Site visits almost always present difficult "Right To Know" Law issues, especially if a quorum of the board go to the site together. If that occurs, advance notice of that visit (which is a meeting of the board under RSA 91-A:2, I) must be posted. Little or no conversation should take place. The applicant has a right to be present, unless the applicant has waived that right on the record, and the most difficult situation occurs when the abutters want to go on the land or into the property with the board members, but the landowner refuses access. If the landowner is also the applicant and refuses to allow the board members access to the site, that is probably sufficient reason to deny whatever application is pending before the board without prejudice (meaning that the application could be filed again in the future if the applicant decides to allow the site visit).

If the landowner is willing to allow entry to the board members, but refuses access to the site to abutters and others who have a stake in the case, it is my view that this is also sufficient reason to deny the application without prejudice. If the board goes on a site visit where others have been barred, it just opens the board to accusations of collusion with the applicant, and perhaps charges that the board improperly received testimony from the applicant during the private site visit – in my view it's just not worth it to accommodate an unreasonable applicant!

PART SIX

ASSISTANCE TO APPLICANTS AND OTHERS

I. Introduction

Much of the success or failure, satisfaction or displeasure that you, your colleagues and others will derive from your role as a land use board member will depend on how you interact with other local boards in your town, and even sometimes in neighboring towns, with applicants, with abutters and other members of the public. Of course, public perceptions of the fundamental wisdom and importance of planning and land use regulation will also be deeply influenced by how those interactions are handled.

While we cannot mend inherent defects in how an individual may perceive and deal with others, we can offer some concrete suggestions to make your work, and the experience of individuals who must come in contact with your board, as smooth and rewarding as possible.

II. Attitude Toward Applicants and Others

Attitude is important. Whether hostile or helpful, welcoming or frosty, the first signals you and the board's staff send to applicants and others will set the tone. That initial tone will often carry through and characterize all of the continuing interactions that occur regarding a particular application. And that initial tone, especially if it's negative, may also drive the board to reach a particular decision in spite of the law, or the facts of the case. It should not.

Perhaps it helps to state the obvious. Most people don't much like government officials telling them how to behave, how to subdivide their land, how to develop it, how they can and cannot use it. And that, fundamentally, is what local land use folks do. So right off the bat there is a inclination toward hostility. You must take every reasonable opportunity to prevent your interactions from becoming adversarial, rather than cooperative.

Cooperative? But, you may ask, am I not the last defender of a fragile environment, out to do righteous battle against the barbarians at the gate? No, you're not. You're a government official, and you must strive to cooperate with those who must interact with your government agency. You must strive to cooperate with landowners seeking development approvals, and with angry abutters seeking to stop that development. You see, "cooperate" does not mean "agree with." It means that you must assist people to understand and interact with the regulatory system in a way that will lead to the making of ultimate decisions in an efficient, evenhanded and meaningful fashion. If you can't be pleasant and helpful, get out of the way.

All this seems pretty warm and fuzzy, doesn't it. But then there are the many places where law and morals become indistinguishable. One of those places was described by our supreme court in the case of *Carbonneau v. Town of Rye,* 120 N.H. 96 (1980). By the time the case got to the supreme court, Mr. Carbonneau had been trying for 4 ½ years to get a building permit to develop his one acre lot as a single family residence. The building permit had been denied because of legitimate concerns about the adequacy of his planned septic system. The town's lawyer stated to the court that there were alternative septic arrangements that would allow a permit to be issued, but that the town *"is not in the business of telling the plaintiff what to do so that he can get approval, he has engineers."* The court responded:

> "We remind the town that it is their function to provide assistance to all their citizens . . . We strongly suggest that the town . . . quickly get 'in the business' of attempting to negotiate a workable plan acceptable to both parties. The town's apparent unwillingness to engage in such discussions to date leads us to question seriously whether it is dealing in good faith."

Take the hint. Provide assistance. And best of luck to you!